

STATE OF MICHIGAN
COURT OF APPEALS

MOHAMMAD AL-MEHDI,

Plaintiff-Appellant,

v

FRED HAFEZI,

Defendant/Cross-Defendant-
Appellee,

and

FORTIS FINANCIAL GROUP, d/b/a FORTIS
BENEFIT INSURANCE, and FORTIS
INSURANCE COMPANY,

Defendants/Cross-Plaintiffs.

Before: Owens, P.J., and Bandstra and Murray, JJ.

PER CURIAM.

Plaintiff Mohammad Al-Mehdi appeals as of right from an order dismissing cross-claims filed by defendants Fortis Benefit Insurance and Fortis Insurance Company (hereinafter collectively referred to as “Fortis”) against defendant Fred Hafezi, an independent insurance agent who sold plaintiff a Fortis policy covering the life of plaintiff’s daughter, Manahel. The issues plaintiff raises on appeal, however, relate to an earlier order in which the trial court granted defendant Hafezi’s motion for summary disposition of plaintiff’s fraudulent misrepresentation and breach of fiduciary duty claims against Hafezi, stemming from Fortis’ failure to honor the insurance contract following Manahel’s death. We affirm.

Plaintiff argues on appeal that the trial court improperly granted summary disposition regarding his fraudulent misrepresentation claim and improperly failed to allow him to amend the complaint to allege innocent misrepresentation. We disagree.

A trial court’s decision to grant summary disposition is reviewed de novo on appeal. *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The trial court did not specify whether it relied on MCR 2.116(C)(8) or (10) in granting defendant Hafezi’s motion for summary disposition. However, because the trial court considered matters outside the

pleadings, we will review the matter under MCR 2.116(C)(10). *Kubisz v Cadillac Gage Textron, Inc*, 236 Mich App 629, 633 n 4; 601 NW2d 160 (1999). When reviewing a motion granted under MCR 2.116(C)(10), this Court must examine all relevant documentary evidence in the light most favorable to the nonmoving party and determine whether there exists a genuine issue of material fact on which reasonable minds could differ. *Progressive Timberlands, Inc v R & R Heavy Haulers, Inc*, 243 Mich App 404, 407; 622 NW2d 533 (2000). This Court must review the record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law. See *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). “Although the court should be liberal in finding genuine issues of material fact, summary disposition is appropriate when the party opposing the motion fails to provide evidence to establish a material factual dispute.” *Porter v Royal Oak*, 214 Mich App 478, 484; 542 NW2d 905 (1995).

The moving party has the initial burden of showing that there is no genuine issue of material fact, either by showing affirmative evidence which negates an essential element of the nonmoving party’s claim or by demonstrating that the nonmoving party’s evidence is insufficient to establish an essential element of his claim. *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001). If the nonmoving party cannot muster sufficient evidence to support his claim, the moving party is entitled to judgment as a matter of law. *Id.* When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996); *Karbel, supra*. The court may not make findings of fact or weigh credibility in deciding a summary disposition motion. *Nesbitt v American Community Mut Ins Co*, 236 Mich App 215, 225; 600 NW2d 427 (1999).

When a party seeks leave of the court to amend a pleading, “[l]eave shall be freely given when justice so requires.” MCR 2.118(A)(2). When deciding a motion for summary disposition which alleges failure to state a valid claim or defense or that no genuine issue as to any material fact exists, the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified. MCR 2.116(I)(5). Entry of a grant of summary disposition does not preclude amendment of the complaint. See *Midura v Lincoln Consolidated Schools*, 111 Mich App 558, 561; 314 NW2d 691 (1981). Leave to amend a complaint may, however, be denied for particularized reasons, such as undue delay, bad faith, or dilatory motive on the movant’s part, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or where amendment would be futile. *Jenks v Brown*, 219 Mich App 415, 420; 557 NW2d 114 (1996). “An amendment is futile where, ignoring the substantive merits of the claim, it is legally insufficient on its face.” *Gonyea v Motor Parts Federal Credit Union*, 192 Mich App 74, 78; 480 NW2d 297 (1991).

“The elements of fraudulent misrepresentation are (1) the defendant made a material representation, (2) the representation was false, (3) when making the representation, the defendant knew or should have known it was false, (4) the defendant made the representation with the intention that the plaintiff would act upon it, and (5) the plaintiff acted upon it and suffered damages as a result.” *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 688; 599 NW2d 546 (1999). A suit alleging negligent misrepresentation requires “proof that a party

justifiably relied to his detriment on information provided without reasonable care by one who owed the relying party a duty of care.” *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 33; 436 NW2d 70 (1989).

In the present case, the trial court concluded that plaintiff could not establish all of the elements of misrepresentation because plaintiff had failed to demonstrate a causal link between Hafezi’s conduct and plaintiff’s harm. Instead, the trial court found that the cause of Fortis’ failure to honor the insurance contract was plaintiff’s failure to disclose Manahel’s true medical history. Upon reviewing the record, we agree with the trial court’s conclusion.

Plaintiff alleges that he relied on Hafezi’s alleged misrepresentations regarding Sun Life Canada Insurance Company’s legal problems in deciding to switch from an incontestable Sun Life policy covering Manahel’s life to a policy with Fortis. However, it was plaintiff’s failure to disclose the accurate medical history of Manahel that caused the detriment plaintiff suffered (i.e., his inability to collect life insurance upon Manahel’s death). Clearly, had plaintiff disclosed Manahel’s true history on his application for insurance with Fortis, coverage would have been denied and he would have maintained coverage under the Sun Life policy. Thus, the trial court was correct in essentially concluding that the lack of effective coverage following Manahel’s death was the fault of plaintiff, not Hafezi.

Further, plaintiff does not allege that Hafezi was made aware of the misrepresentations that plaintiff made on the insurance applications regarding Manahel’s medical history. Thus, even assuming that Hafezi misled plaintiff regarding Sun Life and thus caused plaintiff to get insurance coverage elsewhere, Hafezi could not be liable for damages resulting to plaintiff as a result of plaintiff’s misrepresentations. Damages are generally awarded only for injuries that are foreseeable or within the contemplation of the parties, see, e.g., *Lane v KinderCare Learning Centers Inc*, 231 Mich App 689, 692-693; 588 NW2d 715 (1998), and plaintiff cites no authority to suggest that this rule does not apply in the context of this case.

Finally, we note that a necessary element of misrepresentation is that there be a false representation. Plaintiff has failed to present any evidence indicating that defendant Hafezi’s representations to him regarding the legal status of Sun Life were false. In fact, plaintiff does not even allege that the statements were false. Instead, plaintiff merely contends that defendant Hafezi was in a position to know the nature of the “legal action” against Sun Life, and that defendant Hafezi failed to further investigate in order to adequately advise his clients. Further, plaintiff has appended to his brief on appeal a document that clearly indicates that Sun Life was in fact involved in a class action lawsuit that settled in 1997. This document provides factual support for the validity of defendant Hafezi’s statement that Sun Life was involved in litigation.

For these reasons, the trial court did not err in granting summary disposition on plaintiff’s claim for fraudulent misrepresentation. Further, for these reasons an amendment of plaintiff’s complaint to allege negligent misrepresentation would have been futile. *Gonyea, supra*.

Plaintiff also argues on appeal that by voluntarily assuming the duty of advising plaintiff about the status of his Sun Life insurance, defendant Hafezi also assumed an implied fiduciary duty to act in the best interest of plaintiff, which it breached by misleading plaintiff. Again, we disagree.

A fiduciary duty exists when one party reposes faith, confidence, and trust in reliance upon the judgment and advice of another. *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 580-581; 603 NW2d 816 (1999); *Vicencio v Ramirez*, 211 Mich App 501, 508; 536 NW2d 280 (1995). A person who is in a fiduciary relationship with another is under a duty to act for the benefit of the other person regarding matters within the scope of the relationship. *Teadt, supra* at 581. Relief is granted for breach of a fiduciary relationship when a position of influence has been acquired and abused or when a confidence has been reposed and betrayed. *Id.*; *Vicencio, supra*.

Plaintiff points to defendant Hafezi's deposition testimony that he was a "general agent" as proof that defendant Hafezi was an agent of plaintiff rather than an agent for defendant Fortis. However, the record indicates that during his own deposition, plaintiff acknowledged that, at the time he signed the insurance application, he was aware that defendant Hafezi was working as an agent for defendant Fortis, and not as plaintiff's agent. Nonetheless, even if defendant Hafezi is considered an agent of defendant Fortis rather than of plaintiff, a finding that defendant Hafezi owed a duty to plaintiff for purposes of a breach of an implied contract claim is not precluded. See, generally, *Vutci v Indianapolis Life Ins Co*, 157 Mich App 429; 444 NW2d 157 (1987).

The record indicates that because of defendant Hafezi's pre-existing relationship with plaintiff's brother, plaintiff may have reposed faith, confidence, and trust in reliance upon the judgment and advice of defendant Hafezi, thus seemingly creating a fiduciary relationship between plaintiff and defendant Hafezi. *Teadt, supra* at 580-581. However, we hold that even if a fiduciary relationship existed between the parties, plaintiff has not alleged or produced evidence to show that defendant Hafezi betrayed a confidence or that defendant Hafezi abused his position of influence. As previously discussed, no evidence has been presented to prove that defendant Hafezi's representations were untrue and there is no allegation that Hafezi knew that plaintiff was making misrepresentations that might jeopardize coverage for Manahel's death if coverage was switched from Sun Life to Fortis.

We affirm.

/s/ Donald S. Owens
/s/ Richard A. Bandstra
/s/ Christopher M. Murray